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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ——— 71-393

ALPHONZO L. DOWELL and VIVIAN T. DOWELL,
Petitioners,

VERSUS

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1971

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Alphonzo L. Dowell and Vivian T. Dowell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 2, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Western District of Oklahoma.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 2, 1971. On September 1, 1971, Mr. Justice Blackmun granted an extension of 30 days, to October 1, 1971, in which to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

1. Whether an objection to the composition of the jury based upon the systematic exclusion from the petit jury panel of a racial group where the defendant is a member of the excluded group, presents a question of a right so fundamental that it cannot be deemed to be waived under the provisions of Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C., if not presented before trial.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Rule 12(b)(2), Federal Rules of Criminal Procedure. Defenses and objections which must be raised.

> Defenses and objections based upon defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by making before trial. The motion shall include all such defenses and objections then available to the defendant, failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked because the petitioners were indicted for attempting to evade or defeat federal income taxes pursuant to 26 U.S.C. Section 7201. The petitioners, Dr. Alphonzo L. Dowell and Dr. Vivian T. Dowell, are both black professional people. Petitioner Alphonzo L. Dowell is in addition an Oklahoma City Councilman who has for some years held a highly visible position of leadership in the civil rights movement in Oklahoma City. In 1960 he commenced, on behalf of his son, the Oklahoma City School Integration case, which remains in litigation even to this day. In May of 1970 both petitioners were indicted on four counts charging them with attempting to evade or defeat the payment of taxes on their joint income earned during the years 1963, 1964, 1965 and 1966. They were convicted by a jury verdict in September of 1970; Alphonzo L. Dowell was sentenced to three years on each of four counts, the sentences to run concurrently; Vivian T. Dowell was sentenced to four years, the sentence suspended, and she was placed on probation. Although the Western District for the State of Oklahoma has a substantial number of registered black voters, the jury panel consisted entirely of whites, a highly disproportionate number of blacks on the jury panel being a consistent pattern in the District Court for the Western District of Oklahoma. No challenge was made to the method of jury selection either before or during trial by the petitioners' trial counsel. The issue of discriminatory practices in the jury selection process was raised for the first time by petitioners' appellate counsel (petitioner's trial counsel were not retained for the appeal) at the time

the case was docketed in the Court of Appeals for the Tenth Circuit. That appeal presented for review two issues: (1) that the government had failed to prove the necessary element of willfullness; (2) that defendants had not waived their challenge to the unconstitutional method of jury selection by failing to present it before or during trial. The petitioners' appellate counsel, on the latter issue, asked the Tenth Circuit to remand the case to the District Court for a determination in that court of the question of the systematic exclusion of blacks in the jury selection process. The Tenth Circuit affirmed the convictions on August 2, 1971.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS, IN CONSTRUING A FEDERAL RULE OF CRIMINAL PROCEDURE, SO MISAPPLIED A DECISION OF THIS COURT AS TO NOW CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION OVER THE FEDERAL COURTS.

This case presents an important problem under the Federal Rules of Criminal Procedure as to the proper construction of Rule 12(b)(2) which provides that objections based on defects in the institution of the prosecution must be made before trial or deemed waived. This Court has held that under certain circumstances Rule 12(b)(2) applies to objections based upon the method of selecting the petit jury panel or array. *Frazier* v. *U. S.*, 335 U.S. 497; *Shotwell Mfg. Co.* v. *U. S.*, 371 U.S. 341, 361-363. The *Frazier* case involved a challenge to a method of selection which resulted in a jury panel with an undue proportion of government workers and the unemployed by a defense counsel who had used his peremptory challenges to remove

those few jurors who were privately employed. The *Shotwell* case involved a corporation and two corporate officers convicted of tax evasion who after four years of inaction and with no showing of prejudice challenged an open and notorious method of selecting the petit jury array.

Lower Federal Courts have now, as the Tenth Circuit has here, see Appendix p. vi, construed the *Shotwell* decision to require that an objection, untimely under Rule 12(b)(2), to the method of jury selection be deemed waived even where that objection is to the composition of a jury panel based upon the systematic exclusion of a racial group in cases affecting the liberty of defendant who is a member of that racial group. *Fernandez* v. *Meir,* 408 F.2d 974, 976 (C.A. 9); *Penkney* v. *U. S.,* 380 F.2d 882 (C.A. 8).

We recognize the strong interest in the promulgation of the orderly administration of justice underlying Rule 12(b)(2), but urge that some rights are so fundamental to our conception of justice that their denial may not be deemed waived as a matter of procedural convenience, a principle which this Court has often recognized. *Johnson* v. *Zerbst,* 304 U.S. 458; *Carnley* v. *Cochran,* 369 U.S. 506. A black defendant has no right to a trial by a jury composed in any part by members of his race, but he has a very fundamental right to a trial by a jury whose all-white composition is not the product of a method of jury selection which systematically excluded blacks from the jury panel or array.

For nine decades this Court has held that a conviction cannot stand based upon an indictment from a grand jury

or a verdict of a petit jury from which members of the defendant's race were systematically excluded. *Strauder* v. *West Virginia,* 100 U.S. 303; *Pierre* v. *Louisiana,* 306 U.S. 354; *Whitus* v. *State of Georgia,* 385 U.S. 545. Here petitioners' appellate counsel asked the Tenth Circuit to remand the case to the District Court to afford petitioners the opportunity to now in that court offer proof that the apparent disproportion of blacks on the jury panels in the District Court for the Western District of Oklahoma is in fact the product of an intentional and systematic exclusion of blacks from the jury selection process, creating *per se* a constitutional infirmity in petitioners' convictions. The alternative open to petitioners is to offer this same proof in that same court after Alphonzo L. Dowell has been incarcerated, in a proceeding for a federal post-conviction relief.

During the same term as that in which the *Shotwell* case was decided, this Court expressed its philosophy on the adequacy of that alternative as a remedy. *Fay* v. *Noia,* 372 U.S. 391, 440-441. Speaking of state prisoners who ultimately gain their freedom by means of federal habeas corpus, this Court there said:

> "Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation. Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought never the less to languish in prison."

Surely, those same fair-minded persons would no more contend that one deprived of his liberty through the de-

nial of a fundamental constitutional right which denial was not challenged until after the verdict of conviction ought, because of his failure to meet the requirements of a procedural rule, to be incarcerated to await the slow-grinding machinery of post-conviction relief rather than being permitted to attack that denial after the verdict.

The question this Court must now decide is whether *Shotwell Mfg. Co.* v. *U. S., supra,* may be fairly construed by lower federal courts to apply to *all* objections to jury composition which are untimely by the provisions of Rule 12(b)(2) even where the objection is based upon the systematic exclusion of the defendants' racial group from the jury panel or array.

2. THE QUESTION IS ONE OF FAR-REACHING IMPORTANCE WHICH HAS NEVER BEEN SETTLED BY THIS COURT.

If petitioners because of the technicalities of a procedural rule are not permitted at this time to attack the unconstitutional method of jury selection in the District Court for the Western District of Oklahoma, it is not they alone who will suffer the injury of the consequence. The systematic and intentional exclusion of groups from participation in the jury system shakes the foundations of our society itself. In *Ballard* v. *U. S.*, 329 U.S. 187, 195, this Court said:

> "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large and to the democratic ideal reflected in the prccesses of our courts."

It is submitted that an injury of this magnitude should be brought to light and halted at the earliest possible time in a motion made after the verdict or in an attack on direct appeal, rather than suppressed in the service of a procedural rule to await its remedy through the lengthy process of a proceeding for post-conviction relief.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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September, 1971

APPENDIX

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Tenth Circuit
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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM, 1971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	Nos. 618-70 and 619-70
ALFONZO L. DOWELL and VIVIAN T. DOWELL, Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

William R. Burkett, United States Attorney, for Plaintiff-Appellee.

John W. Walker and Philip E. Kaplan of Walker, Rotenberry, Kaplan, Lavey & Mays (Norman C. Amaker, Of Counsel, on the brief) for Defendants-Appellants.

Before HILL, SETH and DOYLE, Circuit Judges.
DOYLE, Circuit Judge.

[APPENDIX]

Defendants-Appellants, Alfonzo Dowell and Vivian Dowell, husband and wife, were convicted by a jury in the United States District Court for the Western District of Oklahoma of attempting to evade or defeat federal income taxes pursuant to 26 U.S.C. § 7201.[1]

1. It is here contended by the appellants that the judgment should be reversed and the cause remanded because the trial court erred in denying their motions for judgment of acquittal because of the failure of proof in support of the essential element of willfulness.

2. There existed racial discrimination in the selection of the jury. The defendants are black, but were tried by an all white jury. It is said that while this matter was not raised at trial, it was not effectively waived.

According to the evidence, Dr. Alfonzo L. Dowell is an optometrist, and his wife, Dr. Vivian T. Dowell, is a dentist. They both practice their professions in a clinic in Oklahoma City which was built by them in 1956 and financed through a federal savings and loan association. They have three children, all of whom were in school at the time of trial, and the family lives in a home completed in 1959 and purchased for a total contract price of between $42,000 and $44,000 ($32,000 of which was financed).

During the years covered by the indictment, 1963-1966, appellants' tax returns were prepared by an accountant, one W. T. Avery, from information furnished by appellants. The information furnished to Mr. Avery consisted of their receipt books to show professional income, a summary schedule of rental receipts to show rental income,

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[1] 26 U.S.C. § 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

their check stubs from two or three bank accounts[2] and selected cancelled checks to show their expenses. On the basis of this information alone, it appears that the tax returns in question were correctly prepared by Mr. Avery.

For the years covered by the indictment, appellants' tax returns reported income as follows:

Year	Gross Income	Taxable Income	Income Tax
1963	$ 39,682	$289.99	$58.00
1964	38,888	-0-	-0-
1965	37,509	-0-	-0-
1966	43,807	21.28	2.98
Totals	$159,786	$311.27	$60.98

After the Government began its investigation of appellants' taxes in 1968, appellants filed amended tax returns for the years in question reporting income as follows:

Year	Gross Income	Taxable Income	Income Tax
1963	$ 50,165.00	$10,080.00	$ 2,579.00
1964	56,133.00	15,055.00	3,703.76
1965	49,169.00	9,331.00	2,111.00
1966	52,428.00	8,794.58	2,027.38
	$207,895.00	$43,260.58	$10,421.14

Thus, it is beyond question that appellants understated their income by at least $48,000 during the four years. The inquiry then is whether they did so willfully and whether

[2] Appellants maintained three bank accounts. Dr. Alfonzo Dowell's account, used by him to pay his business and personal expenses, Dr. Vivian T. Dowell's account, used by her to pay her business and personal expenses, and the Dowell Building Fund account, used to pay expenses chargeable to both appellants. Deposits to these accounts were not made from particular sources.

the Government's evidence was sufficient for the jury to so conclude and for the trial court to have denied appellants' motions for judgments of acquittal.

The attempt to evade or defeat the tax must be a willful attempt. The Government must prove beyond a reasonable doubt that there was an attempt made voluntarily and intentionally, and with the specific intent to keep from the Government a tax imposed by the tax laws. The accused must be shown by the evidence to have been under a duty to pay the Government and must be shown to have known that it was his legal duty to pay. Thus, the evidence must establish beyond a reasonable doubt a wrongful intent to evade the tax. Hargrove v. United States, 67 F.2d 820 (5th Cir. 1933). See also McCarty v. United States, 409 F.2d 793, 795 (10th Cir. 1969); Cf. Spies v. United States, 317 U.S. 492 (1943). Such intent may be proved by circumstantial evidence, upon which reasonable inferences can be based. Swallow v. United States, 307 F.2d 81, 83 (10th Cir. 1962); cf. Haskell v. United States, 241 F.2d 790, 793 (10th Cir. 1957).

Courts have held various types of evidence under various types of circumstances to support a reasonable inference of willfulness. For example, the most applicable statement by the Supreme Court in Holland v. United States, 348 U.S. 121, 139 (1954), regarded a pattern of underreporting to be sufficient:

> The petitioners contend that willfulness "involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand.

In the case at bar, there is strong evidence in support of an inference of willfulness.

1. The amended returns filed for the years in question reveal a consistent pattern of underreporting large amounts of income. Further, during the same period of time, the deposits to defendants' various checking and savings accounts totaled some $60,000 more than was initially reported as gross income.

2. The defendants spent $67,000 for non-deductible expenditures, including reduction of their mortgage indebtedness by more than $28,000, life insurance premiums of $15,949, $4,461 in private school tuition for their children, the purchase of two new Buick automobiles, and $3,344 for household held—while reporting $311 in taxable income.

3. They were also making payments, from 1958 through 1967, on a building which cost $60,000.

From these large nondeductible expenditures, it may be inferred that appellants knew that their taxable income was greater than that reported.

Evidence of intent to evade is also found in the extensive use of cash by the defendants—cash which apparently was not withdrawn from their bank accounts, but rather had never found its way into a bank account. In 1965, for instance, the appellants wrote checks to cash totaling $210, yet paid $1,500 in cash to a bank on a loan. Over the four year period the appellants wrote only $1,400 in checks for groceries to feed a family of five, an average of $6.73 per week. Although appellants never had fewer than two automobiles, they never wrote any checks for gasoline and oil.

Since the appellants did not keep records of income in their receipt book which they gave to their accountant for income tax purposes, it may be reasonably inferred by a jury that their failure to include in those receipt books

such substantial amounts of income as were shown here pointed to something more than mere inadvertence or negligence.

We conclude then that the evidence in the record before us fully justified the submission of the case to the jury, and the trial court properly denied appellants' motions for judgments of acquittal. Appellants' defenses of ignorance in tax matters and complete reliance on their accountant presented issues of fact properly determined by the jury.

We need not consider on its merits appellants' contention that their convictions should be reversed and the cause remanded for new trial because the issue of racial discrimination in the jury selection process was not raised below nor effectively waived by the defendants. Appellants do not *now* allege that the jury panel was in fact improperly selected, and if their contention *were* to be construed by this Court as a positive assertion of improper selection (which it is not), it is doubtful that they would not be deemed to have waived this objection, for purposes of appellate review, by failure to present such objection pursuant to Rule 12(b), Fed.R.Crim.P. Shotwell Mfg. Co. v. United States, 371 U.S. 341, 361-63 (1963). If appellants do have a meritorious constitutional challenge to the selection of the jury panel or array, it would be more properly raised in a collateral proceeding. See Fernandez v. Meier, 408 F.2d 974 (9th Cir. 1969) (holding that in a petition filed pursuant to 28 U.S.C. § 2255, the issue of waiver must be determined according to the standards of Fay v. Noia, 372 U.S. 391 (1963), rather than Rule 12(b)(2).

The judgments of conviction herein are affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-393

ALPHONZO L. DOWELL AND VIVIAN T. DOWELL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were indicted and convicted in the United States District Court for the Western District of Oklahoma on four counts of willfully attempting to evade or defeat federal income taxes for calendar years 1963–1966, in violation of Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201). Petitioner Alphonzo L. Dowell was sentenced to three years' imprisonment on each count, the sentences to run concurrently, and his wife was placed on probation with imposition of sentence reserved. The court of appeals affirmed (Pet. App. (i–vi)).

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The single question raised here is whether the decision of the court below should be reversed and the cases remanded to the district court for a hearing on the question of whether members of the racial group of which petitioners are members were systematically excluded from the petit jury panel (Pet. 2). Neither petitioners, both educated professional people, nor their attorneys, objected in the district court to the method of selecting jurors. In the court of appeals, where petitioners first attempted to raise the question of exclusion of blacks from the jury, petitioners did not assert that the method of selection was in fact improper but merely requested a remand to determine if there might have been systematic exclusion (Pet. 4, Pet. App. vi).

1. Factually unsupported suspicion that a basic constitutional right may have been denied presents a question which an appellate court should not be required to face when raised before it for the first time. *Frazier* v. *United States*, 335 U.S. 497, 503. As noted by the court of appeals (Pet. App. vi), petitioners' grievance is one especially suited for resolution under 28 U.S.C. Section 2255. See, *e.g.*, *Fernandez* v. *Meier*, 408 F. 2d 974 (C.A. 9). Under Section 2255 the district court will have the opportunity to receive evidence and rule on the two essential issues of fact involved: (1) Did petitioners, for purposes such as trial strategy or other considerations, effectively waive objection to the jury makeup under the standards announced in *Fay* v. *Noia*, 372 U.S. 391, 438? See also *Whitus* v. *Balkcom*, 333 F. 2d 496 (C.A. 5). (2)

Have petitioners met their burden of proving the existence of purposeful discrimination in the jury selection process? See *Whitus* v. *Georgia,* 385 U.S. 545, 549–550.

2. This Court is not now in a position to evaluate petitioners' case with respect to either essential question of fact, and a reversal of the decision of the court of appeals in this case would bring substantial disruption to the existing system of trial and appellate review. Rule 12(b)(2), Fed. R. Crim. P., would be rendered meaningless and harmful opportunities for delay based on mere assertion would be created.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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